9-20-2011

Hobson Manufacturing Corp. v. SE/Z Const. Respondent's Brief Dckt. 38202

IN THE SUPREME COURT OF THE STATE OF IDAHO

HOBSON FABRICATING CORP., an Idaho corporation, Plaintiff/Appellant, v. STATE OF IDAHO, acting by and through its Department of Administration, Division of Public Works, Defendant/Counter Crossclaimant/ Respondent, and SE/Z CONSTRUCTION, LLC, an Idaho limited liability company, Defendant/Co-Appellant.	)	Supreme Court Docket Nos. 38202-1010 and 38216-1010)

STATE OF IDAHO'S RESPONSE BRIEF

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Appeal from the District Court of the Fourth Judicial District of the State of Idaho, In and for the County of Ada, Honorable Ronald J. Wilper, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case arose from two contractors' failed attempt to extract $1.9 million from the State of Idaho after the State decided to terminate a construction contract. One of the contractors even went so far as to file a defamation suit against the State employees who administered the Contract, which action was summarily dismissed. The contractors caused the State to incur hundreds of thousands of dollars defending against their exorbitant and unjustified demand as well as repairing their grossly deficient work. The district court agreed that the contractors' interpretation of the contract did not allow them to seek the sums demanded; however, it also unfortunately determined that the State could not seek any offsets to the contractors' claims or seek reimbursement for costs expended to repair their deficient work. Thereafter, the parties reached a negotiated settlement with the State agreeing to pay one of the contractors $225,000, without any admission of liability. Incredibly, both contractors then claimed they were entitled to an award of attorney fees and costs in excess of $850,000 as prevailing parties and have appealed the district court's denial of that request.

B. Course of the Proceedings

On October 26, 2005, Appellant Hobson Fabricating Corp. ("Hobson") filed a Complaint against Appellant SE/Z Construction, LLC ("SE/Z") and Respondent State of Idaho, Division of Public Works (the "State") for damages related to the construction of a Level 3 BioSafety Lab (the "Lab" or the "Project") in Boise, Idaho. (R. Vol. I, pp. 35-62). SE/Z was the Project's general contractor and Hobson was SE/Z's mechanical subcontractor (collectively, the

"Contractors"). Attached to Hobson's Complaint was its Notice of Tort Claim against the State which identified its damages as $1,556,930.44. (R. Vol. I, pp. 52-62). SE/Z then filed a cross-claim against the State, in which it asserted claims on behalf of itself and its subcontractors related to the Project. (R. Vol. I, pp. 71-78). SE/Z provided the State with an original claim amount on the Project of $1,973,107.38, which included claims from Hobson. (R. Vol. V, 979-997). The State, in turn, filed counter-claims against Hobson, as well as cross-claims against SE/Z. (R. Vol. I, pp. 97-104; pp. 105-114). The State also filed a third-party claim against Rudeen & Associates ("Rudeen"), the Project architect, related to Hobson and SE/Z's claims of design error as well as other acts and omissions. (R. Vol. I, pp. 115-173). On January 10, 2006, Hobson filed a Complaint against several employees of the State alleging slander, tortious interference with contractual relations and intentional interference with prospective economic relations. (R. Vol. I, pp. 193-199). The slander causes of action and the Project causes of action were consolidated. (R. Vol. II, pp. 200-202).

Substantial motion practice took place during the course of this litigation. Specifically, SE/Z and/or Hobson moved for summary judgment or partial summary judgment on numerous occasions with regard to the State's affirmative claims, offsets and defenses based on various grounds. These motions were denied in 2006, 2007 and 2008 based on genuine issues of material fact and the State was allowed to continue to pursue its claims, offsets and defenses based upon SE/Z and Hobson's defective work.

In April 2007, Hobson's claims against the individual Defendants were dismissed pursuant to a partial summary judgment. (R. Vol. II, pp. 250-273). Also in 2007, the Court

dismissed all direct claims between Hobson and the State. (R. Vol. II, pp. 238-249; pp. 250-273). As a result of the district court's rulings, the only remaining claims were Hobson's claims against SE/Z, SE/Z's claims against the State for termination for convenience damages, and the State's claims against SE/Z and Rudeen.

In October 2008, this case was tried for 11 days until a mistrial was declared. (R. Vol. III, pp. 437-438). The district court subsequently froze discovery and motion practice except for motions in limine related to trial evidence. (R. Vol. III, p. 438). In March 2010, the district court heard, over the State's objections, Hobson's Motions in Limine and Motion to Dismiss Rudeen, and subsequently granted the motions. (R. Vol. IV, pp. 619-629). By so ruling, the district court reversed itself on all of its previous rulings and dismissed the State's claims and offsets related to the Contractors' defective work. (R. Vol. IV, pp. 625-626). Following the district court's rulings, the State and SE/Z entered into their settlement. (R. Vol. IV, pp.746-749).

C. Concise Statement of the Facts

On or about July 31, 2003, the State awarded a contract ("the Principal Contract" or "the Contract") to SE/Z for "DPW Project #02-353, Health and Welfare Remodel State Lab for BSL-3" (the "Project"). (R. Vol. II, pp. 330-352). The Project involved the construction of a Level 3 Bio-Safety Lab (the "Lab") in Boise, Idaho. The Lab, once constructed, was intended to serve as a facility capable of handling extremely dangerous substances, such as anthrax or avian flu virus, enabling the State to analyze and contain such substances. Affidavit of Elaine Hill in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Hill Aff."), ¶ 2, filed on May 22, 2006;

Affidavit of Albert F. Munio in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Munio Aff."), ¶ 10 filed on May 22, 2006; Affidavit of Joe Rutledge in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Rutledge Aff."), ¶ 8 filed on May 22, 2006.[1] Because of the unique purpose of the Lab, it was absolutely critical that the facility be constructed correctly, as specified by the construction documents, to ensure that the substances handled in the Lab would not endanger employees of the Lab or the surrounding citizenry. Munio Aff. ¶10.

On or about August 25, 2003, SE/Z signed a Subcontract Agreement ("the Subcontract") with Hobson, whereby Hobson agreed to perform mechanical work on the Project as SE/Z's sub-contractor. (R. Vol. III, pp. 418-427). The mechanical work on the Project was the most critical component for the safe operation of the facility, as it involved the exhaust systems, which were intended to filter and capture the dangerous substances handled in the Lab and prevent them from being released into the Lab or the atmosphere. Hill Aff. ¶ 9; Munio Aff. ¶ 10. Work on the Project commenced in approximately September 2003, with an anticipated completion date of May 26, 2004. Hill Aff. ¶ 3; Affidavit of Jan Frew in Support of Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction, LLC's Motions for Partial Summary Judgment ("Frew Aff."), ¶ 2.[2]

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[1] These affidavits have been submitted with the State's Motion to Augment the Record and are attached thereto for reference.

[2] The Affidavit of Jan Frew has been submitted with the State's Motion to Augment the Record.

Various issues with the Contactors' workmanship arose during the Project. For example, in approximately January 2004, the State and the engineer on the Project, Traci Hanegan, discovered that Hobson had installed an inferior grade of stainless steel with respect to the ductwork. Hill Aff. ¶ 5; Frew Aff. ¶ 3; Rutledge Aff. ¶ 3. In addition, in the Spring and Summer of 2004, the State brought in a third-party welding inspector, Mark Bell, to inspect Hobson's welds on the ductwork. Hill Aff. ¶ 6 and Ex. A; Frew Aff. ¶ 4; Rutledge Aff. ¶ 4. Mr. Bell discovered on both occasions that Hobson recklessly performed defective welding. *Id.* By this point in time, the Project was considerably delayed, due, in large part, to Hobson's actions. Hill ¶¶ 5, 7; Frew Aff. ¶¶ 3, 5-6; Rutledge Aff. ¶¶ 5-6. In the Spring of 2005, the State discovered that Hobson had negligently failed to install dampers clearly specified in the construction documents. Hill Aff. ¶ 7; Frew Aff. ¶ 5; Rutledge Aff. ¶ 5. These dampers were critical to the successful filtration and capture of substances handled in the Lab, and were necessary to prevent the release of such substances into the outside air. Hill Aff. ¶ 7. This incident resulted in further delay of the Project, which, by this time, appeared to be making no progress towards completion. Hill Aff. ¶ 7; Frew Aff. ¶¶ 5-6; Rutledge Aff. ¶¶ 5-6. SE/Z, as the general contractor, failed to keep the Project on schedule. Hill Aff ¶ 7.

In June 2005, the State, believing the Project was 90% complete and would require only a relatively small sum of money to reach completion, decided to terminate its Contract with SE/Z for convenience. Hill Aff. ¶ 8; Frew Aff. ¶ 6; Rutledge Aff. ¶ 6. Following its termination for convenience, the State retained Washington Group International ("WGI") to inspect the work completed on the Project in order to determine what work was still needed to reach completion.

Hill Aff. ¶ 9; Munio Aff. ¶ 2; Frew Aff. ¶7; Rutledge Aff. ¶ 7. WGI discovered that the mechanical work completed by Hobson was unacceptable by normal industry standards, was grossly defective, and deviated grossly from the Contract specifications. Munio Aff. ¶¶ 4-11, 12-13 and Ex. B; Frew Aff. ¶ 7; Rutledge Aff. ¶ 7; Hill Aff. ¶ 9. WGI's inspection revealed serious concealed defects with Hobson's work, including unacceptable weld conditions (such as a failure to "purge" the welds with argon gas) and seriously damaged materials due to installation error. *Id.* As constructed, the Lab could not operate safely. Munio Aff. ¶ 10. The original Contract with SE/Z provided a budget of $1,314,883 to complete the entire Project. (R. Vol. II, p. 331). Hobson was to receive a total of $657,500 for its work on the Project. (R. Vol. III, p. 419). Despite the fact that Hobson had allegedly completed approximately 90% of its work on the Project, in order to bring the Project to completion, the State was forced to replace much of Hobson's mechanical work at a cost then estimated at well over one million dollars. Munio Aff. ¶¶ 3, 12; Munio Aff., Ex. B, p. 11711; Hill Aff. ¶ 9. In other words, the State was in a situation where it believed it had to expend more than the original Contract price for Hobson's work—and nearly the full original Contract price for the entire Project—to bring the Lab to completion in accordance with the Contract specifications and in a manner that ensured the safety of the surrounding citizenry.

On October 4, 2005, the State received a Request for Equitable Adjustment ("REA") from SE/Z seeking an additional $1,973,107.39 over and above the payments it had already received. (R. Vol. V, 979-997). The Contractors claimed the termination for convenience allowed them to recover all costs incurred while performing their work on the Project.

During the course of the lengthy litigation, the Project was rebuilt. During the rebuild, numerous new and significant defects were discovered, which required additional time, materials and expense above and beyond the original estimate provided by WGI. (R. Vol. VI, 1031-Vol. VII, 1384). These additional defects included paint peeling off of the drywall throughout the Lab due to insufficient cleaning of the drywall prior to application of the paint, which resulted in extensive rework and costs. Id. It was further discovered that SE/Z had failed to secure the BioSafety Cabinets in the Lab or properly attach the cabinets in the Lab rooms to the wall, all of which would have created extremely hazardous conditions had they not been discovered. Id.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Does an Idaho Rule of Civil Procedure 54(d)(1)(B) prevailing party analysis apply to determine a prevailing party under I.C. § 12-117?

2. If an Idaho Rule of Civil Procedure 54(d)(1)(B) prevailing party analysis applies, does the Court still exercise free review or apply an abuse of discretion standard to a district court's determination of prevailing party status?

3. If the Court exercises free review, is the State of Idaho entitled to an award of attorney fees and costs as a partially prevailing party under I.C. § 12-117(2)?

III. ATTORNEY FEES ON APPEAL

The two-part test for an award of attorney fees under I.C. § 12-117 applies on appeal as well. Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 120, 90 P.3d 340, 345 (2004). Accordingly, if the State prevails on appeal, it should be awarded its reasonable attorney fees and costs as the Contractors have pursued this appeal without a reasonable basis in fact or law. The district court correctly determined that both parties prevailed in part and, therefore, exercised its discretion to determine neither was a prevailing party. Furthermore, the Sate clearly

had a reasonable basis in law or fact to prove its affirmative claims against SE/Z in the case below. Moreover, the issue of whether the State could maintain its affirmative claims against SE/Z involved questions of first impression. In such situations, the Contractors should have known, the Court is generally reluctant to find a party acted without a reasonable basis. Therefore, the Contractors have pursued this appeal without a reasonable basis in fact or law and the State should be awarded its cost and attorney fees on appeal.

IV. SUMMARY OF ARGUMENT

Idaho Code § 12-117 is the exclusive means for awarding attorney fees and costs against state agencies. An award of fees under I.C. § 12-117 is mandatory, but only if the Court finds in favor of the prevailing party and the non-prevailing party acted without a reasonable basis in fact or law. In this case, the district court did not find in favor of SE/Z or Hobson since no judgment was rendered and SE/Z and the State entered into a negotiated settlement to resolve their dispute. Therefore, the Contractors are not prevailing parties.

Furthermore, the State had a reasonable basis in fact or law to pursue its affirmative claims against SE/Z. The State discovered numerous construction defects which grossly deviated from the plans and specifications, rendering the Lab unfit and dangerous. Despite already receiving more than $1.3 million for their work on the Project, the Contractors presented the State with a Request for Equitable Adjustment in which they claimed entitlement to over $1.9 million. Since the State believed it was going to spend more to fix the Contractors' defects than the original Contract price, and faced an unreasonable demand for payment from the Contractors, it was necessary to defend against the demand and pursue recovery of the amounts spent

repairing the defects. The Contract itself allowed the State to pursue its claims against SE/Z. The only questions were as to the effect of the termination for convenience and application of the claim notice provision. Both of these issues were questions of first impression in Idaho and the State found support for its position in both Idaho and federal case law. Therefore, the State had a reasonable basis in fact or law to pursue affirmative claims against SE/Z.

V. STANDARD OF REVIEW

In Rincover v. State Dept. of Finance, this Court concluded that it exercises free review of a district court's decision whether to award attorney fees under Idaho Code § 12-117. 132 Idaho 547, 549-550, 976 P.2d 473, 475-476 (1999). In reaching its conclusion, the Court explained that the two predicates for determination of an award under I.C. § 12-117 do not require factual findings but "are more in the nature of legal conclusions, since the first one depends upon successfully achieving some form of favorable relief that properly can be granted by the court to the 'person,' and the other depends upon the assessment of the conduct of the other party..." Id. The Court has continued to use the free review standard since Rincover. Zingiber Inv., LLC v. Hagerman Highway Dist., 150 Idaho 675, 249 P.3d 868, 879 (2011); Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806, 808, 172 P.3d 1081, 1083 (2007); Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 118, 90 P.3d 340, 343 (2004).

VI. ARGUMENT

A. THE CONTRACTORS ARE NOT ENTITLED TO ATTORNEY FEES UNDER IDAHO CODE § 12-117

This brief will respond to the arguments raised in both Hobson's and SE/Z's appellate briefs. Idaho Code § 12-117 is the exclusive means for awarding attorney fees and costs against

state agencies. Smith v. Washington County Idaho, 150 Idaho 388, 247 P.3d 615, 619 (2010); Lake CDA Investments, LLC v. Idaho Dept. of Lands, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010). The statute provides:

> (i) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivisions or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

I.C. § 12-117.

An award of attorney fees under I.C. § 12-117 is mandatory, but only if "(1) the court finds in favor of the person, and (2) the Department acted without a reasonable basis in fact or law." Stacey v. Idaho Dept. of Labor, 134 Idaho 727, 731, 9 P.3d 530, 534 (2000); Burns Holdings, LLC v. Madison County Bd. of City Com'rs, 147 Idaho 660, 669, 214 P.3d 646, 650 (2009); Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007); Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). A party must satisfy both parts of this test to be entitled to attorney fees.

1. A Rule 54(d)(1)(B) prevailing party analysis does not apply to I.C. § 12-117

The Contractors argue that the district court erred by failing to find they were prevailing parties under I.C. § 12-117 by virtue of a Rule 54(d)(1)(B) prevailing party analysis. They also argue that the district court erred by not even mentioning I.C. § 12-117 in its analysis. Nevertheless, since this Court exercises free review, whether and how the district court erred is really not at issue. This Court will render its own decision on the issue of prevailing party status. However, to do so, I.C. § 12-117 has its own test for determining prevailing party status and a

Rule 54(d)(1)(B) analysis is inapplicable. Yet, no matter what test is used, the Contractors are not prevailing parties.

In 2000, this Court issued its opinion in Stacey, supra, expressing the two-part test for an award of attorney fees under I.C. § 12-117. At that time, the statute contained the exact language used in the two-part test. However, the Court also noted that the statutory language had recently been amended to permit recovery of attorney fees by the "prevailing party" and not just by a "person." Id. at fn2. The Court explained that the amendment simply made the recovery of attorney fees under the statute a two-way street, allowing a state agency to receive attorney fees if it prevails and the adverse party acted without a reasonable basis in fact or law. *See* Neighbors For Responsible Growth v. Kootenai County, 147 Idaho 173, 177, 207 P.3d 149, 153 (2009) ("In 2000, the statute created a 'two-way street,' authorizing an award of attorney fees to either the governmental entity or to the person..."). The amendment still required the court to find "that the party against whom the judgment was rendered" acted without a reasonable basis in fact or law. Id.

Despite the change from "person" to "prevailing party" in 2000, the Court has continued to use the same two-part test expressed in Stacey. *See* Burns, LLC v. Madison Cnty Bd of Cnty Com'rs, 147 Idaho 600, 664, 214 P.3d 646, 650 (2009); Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007); Reardon v. Magic Valley Sand and Gravel, Inc., 140 Idaho 115, 118, 90 P.3d 340, 343 (2004). In Reardon, four years after the amendment, this Court reiterated that a "prevailing party [under I.C. § 12-117] is one the court finds for in a case." 140 Idaho at 119, 90 P.3d at 344. This language echoes the first prong of

the Stacey test. In other words, a prevailing party is the party for whom judgment was rendered. Neighbors v. Kootenai County, 147 Idaho at 177, 207 P.3d at 153.[3]

2. The Contractors are not prevailing parties because the district court did not find in their favor

In this case, the district court did not render a judgment to either SE/Z or Hobson. To the contrary, SE/Z and the State reached a negotiated settlement to resolve their dispute, whereby the State did not admit any liability. Therefore, the Contractors are not prevailing parties under I.C. § 12-117 and are not entitled to an award of attorney fees.

a. Even Under a Rule 54(d)(1)(B) Prevailing Party Analysis, the Contractors are Still Not Prevailing Parties

The Contractors argue that they are "overall prevailing parties" under a Rule 54(d)(1)(B) analysis. Even if a Rule 54(d)(1)(B) analysis applies to I.C. § 12-117, the Contractors are still not prevailing parties. Essentially, the Contractors argue they prevailed because they defeated the State's cross-claims, retained their own affirmative claims, and received a positive recovery from the State. (Appellant SE/Z Construction, LLC's Brief, pp. 10-13 ("SE/Z's Brief"); Opening Brief of Co-Appellant Hobson Fabricating Corporation, pp. 33-36 ("Hobson's Brief")). However, the Contractors ignore the fact that the State successfully defeated all of Hobson's claims, never attempted to dismiss any of SE/Z's claims, and was successful in defeating the

[3] The Idaho legislature amended this statute again in 2010. As part of these amendments, the legislature removed the "against whom the judgment is rendered" language and replaced it with the term "nonprevailing party." The Court has only discussed the 2010 amendments in one case; Smith v. Wash. County Idaho, 150 Idaho 388, 247 P.3d 615 (2010). However, the Court in Smith focused on the distinction between "administrative judicial proceedings" and "administrative proceedings." 247 P.3d at 619. The Court has not considered what effect removing the "against whom the judgment is rendered" language has on the prevailing party status.

Contractors' attempt to convert the fixed-price contract into a cost-plus contract, thereby severely reducing and limiting their $1.9 million claim.

"In determining which party prevailed in an action where there are claims and counterclaims between opposing parties, the court determines who prevailed 'in the action.' That is, the prevailing party question is examined and determined from an overall view, not a claim-by-claim analysis." Jorgensen v. Coppedge, 148 Idaho 536, 224 P.3d 1125, 1127 (2010); citing Eighteen Mile Ranch, L.L.C., v. Nord Excavating & Paving, Inc., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005).

The three principal factors to be considered when determining which party, if any, prevailed in a matter are as follows: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. Sanders v. Lankford, 134 Idaho 322, 1 P.3d 823, 826 (Ct. App. 2000). An application of these principals and factors establishes that, as the district court correctly determined in this case, there was no prevailing party to whom costs and attorney fees should be awarded.

There is not always a prevailing party. *See* Owner-Operator Indep. Drivers Ass'n v. I.P.U.C., 125 Idaho 401, 407, 871 P.2d 818 (1994); Powell v. Sellers, 130 Idaho 122, 130, 937 P.2d 434 (Ct. App. 1997); Weaver v. Millard, 120 Idaho 692, 819 P.2d 110 (Ct.App. 1991). In this case, SE/Z and the State reached a settlement to resolve their dispute. No judgment was rendered. Yet, the Contractor's main argument for prevailing party status is that SE/Z received a sum of money from the State for settlement.

SE/Z, citing Straub v. Smith, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007), argues that "[a] party who receives a favorable settlement outcome qualifies as a prevailing party for the purpose of determining fees and costs unless the settlement agreement states otherwise." (SE/Z's Brief, p. 12). This is a misstatement of the holding in Straub. In Straub, this Court simply held that a party does not implicitly waive its right to seek costs and fees when a stipulation to dismiss with prejudice is silent on the issue. 145 Idaho at 69, 175 P.3d at 758. The Court stated: "Hence, we hold that although the dismissal was pursuant to IRCP 41(a)(1), the Smiths did not waive their claim to fees and costs by failing to expressly reserve that issue in their stipulation." Id. This holding does not mean that a party who receives payment through a settlement "qualifies as a prevailing party." SE/Z, simply by receiving payment from the State through a negotiated settlement, does not automatically become a prevailing party.

Moreover, even where a party obtains a judgment for money, they may not be the prevailing party. *See* Yellow Pine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54 (1983). In Yellow Pine, the plaintiff, a water association, brought a test case in magistrate court to collect $234 from a homeowner. At trial, the plaintiff was awarded $56 in water fees and disconnect charges. The trial court awarded the plaintiff $318 in costs and $700 in attorney fees as the prevailing party. On appeal, the Supreme Court of Idaho reversed the trial court's costs and fees determination and found the plaintiff was not the prevailing party. Id. 105 Idaho at 352, 670 P.2d. Specifically, the Supreme Court of Idaho found that the plaintiff "made an excessive demand, i.e., $384 (amended at trial to $234), although the proper amount due, *i.e.*, $26, had been tendered." Id. In Adams v. Krueger, the plaintiff recovered damages in a negligence action,

but was found to be 49% negligent to the defendants' 51%. The trial court held that although the plaintiff recovered damages, that neither party was a prevailing party, and such decision was upheld on appeal. 124 Idaho 74, 77, 856 P.2d 864 (1993).

Similarly, in Weaver v. Millard, the plaintiff's contractor entered into an oral contract with defendants to construct commercial fish ponds. 120 Idaho 692, 695, 819 P.2d 110, 113 (Ct. App. 1992). The defendant partnership withheld payment of $18,723.76 to Weaver for work completed after the project's costs exceeded expectations. Weaver filed a lien on the property and brought an action to foreclose the lien. The partnership filed a counterclaim arguing the work was defective. Id. After a six day bench trial, the trial court awarded Weaver $5,813.63 on the contract but refused to foreclose on the lien because his statement of demand failed to account for deductions and just credits. Id. 120 Idaho at 696, 819 P.2d at 114. The trial court arrived at the damage award after deducting: $7,497 paid directly by the defendant to a material supplier on behalf of Weaver; $1,313.37 for labor overcharges; $719.76 for concrete overcharges; and $3,380 for costs to repair Weaver's poor workmanship. Id. The trial court determined neither Weaver nor the partnership prevailed at trial and refused to award attorney fees pursuant to I.C. § 12-120. Id. In affirming the trial court's decision, the Idaho Court of Appeals stated:

> The district court concluded that Weaver and the partnership each prevailed on one of the two issues between them, but that each received far less than the respective relief they sought. The district court reached these conclusions through an exercise of reason, and the court did not abuse its discretion in concluding that neither Weaver nor the partnership prevailed against the other.

120 Idaho at 702-703, 819 P.2d at 120-121; See also, Israel v. Leachman, 139 Idaho 24, 25-26 72 P.3d 864, 865-866 (2003) (jury ruled in favor of plaintiff for violation of Consumer Protection Act and awarded $10,000 in damages, but also ruled in favor of defendants with regard to intentional misrepresentation claim. Supreme Court of Idaho upheld district court's finding that both parties had prevailed in part and neither was a "prevailing party."); Stewart v. Rice, 120 Idaho 504, 511, 817 P.2d 170, 177 (1991) (plaintiff sought $500,000 for personal injury sustained in ski accident. Jury found defendant 90% at fault and awarded $4,504. Despite obtaining affirmative relief, trial court held there was no prevailing party); Trilogy Network Systems, Inc v. Johnson, 144 Idaho 844, 172 P.3d 1119 (2007) (Supreme Court of Idaho upheld district court's determination that neither party was a "prevailing party" when jury found defendant breached the contract but there were no resulting damages and, therefore, both parties prevailed in part).

In this case, Hobson filed a complaint against SE/Z and the State. SE/Z filed a cross-claim against the State asserting claims on behalf of itself and Hobson in the amount of $1,973,107.38. The State, in turn, filed a counterclaim against Hobson and a counter cross-claim against SE/Z. As such, there were multiple claims and issues between the parties. The State's claim against SE/Z sought recovery of money the State was forced to expend to secure a working and safe Lab. A Lab for which the State had already paid SE/Z $1,362,329.00 at the time it terminated SE/Z's contract. The State retained 5% of payments on the Project as well as the final payment from SE/Z for a total of $95,155.00. (R. Vol. VIII, p. 1520, fn2). Yet, despite only having $95,155.00 in outstanding pay requests and retainage, the Contractors demanded payment

of $1,973,107.38; more than twenty times the amount outstanding. The Contractors' drastically inflated demand was directly related to their attempt to convert the fixed-price contract into a cost-plus contract. The Contractors argued that the State's termination for convenience allowed them to go back and request payment for all of their costs incurred on the Project. As the district court noted, "Plaintiff requests that the Court rewrite the clear and unambiguous language of the fixed price contract entered into by the parties to include a cost plus penalty for termination for convenience." (R. Vol. IV, p. 735). The State successfully defeated this portion of the Contractors' claims.

> The Court specifically rejects the contention that the clause converts the fixed price contract into a cost-plus contract. The Court finds that the Contactors are not entitled under a termination for convenience to receive money they would not have received if the contract had been completed. The Court further finds the term "Work" does not include all costs incurred by the Contractors, but only includes "construction and services required by the Contract Documents" or, to be specific, the work done under the contract in accordance with the plans and specifications for which the Contractors have not been paid and for which they would have been paid had the contract gone to completion.

(R. Vol. IV, p. 736)

The Contactors' contention that they were entitled to recover all of their costs because the State terminated SE/Z's contract for convenience, was the driving force behind the entire litigation. It started with the Contractors' exorbitant REA claim of $1.9 million after the termination and continued with the Hobson's Complaint and SE/Z's cross-claim. The State successfully defeated this unreasonable claim.

SE/Z, citing Jorgensen v. Coppedge, 148 Idaho 536, 541-42, 224 P.3d 1125, 1130-31 (2010), argues that it is not proper to consider SE/Z's exorbitant $1.9 million pre-suit demand

when determining which party prevailed. (SE/Z's Brief, p. 12, fn.4). However, the court in Jorgensen held that "district courts may not consider settlement negotiations in the attorney fees determination." Id., at 542, 1131 [Emphases added]. The Contractors' $1.9 million demand was a Request for Equitable Adjustment under the Contract. It was a claim; not a settlement offer. The Contractors' claim amounted to an excessive litigation demand which must be considered to determine the extent to which each party prevailed.

The State was also prepared to present evidence of the grossly deficient work, including pieces of ductwork, malfunctioning dampers, bags of peeled off paint, videos of poorly welded duct work and hundreds and hundreds of photographs depicting deficient conditions of the Lab as constructed by SE/Z and Hobson, including: acid drain pipes that had holes drilled into it; ceiling hangers secured by wrapped wire resulting in waiving ceilings; cabinets meant to hold potentially toxic materials attached to walls with molly bolts in drywall instead of metal backing; damaged hepa filters; and other non-conformities. However, on the eve of the second trial in this matter, the district court barred the State from presenting this evidence and essentially dismissed the State's claims and offsets against SE/Z. However, the State retained its defenses to SE/Z's claims that the work was not performed in accordance with the plans and specifications. After the court's ruling, the State, without admitting liability, agreed with SE/Z to settle the case for $225,000.

The Contractors' claimed damages in the amount of $1,973,107.38. There were multiple claims and issues involved in this litigation. The State successfully defeated all of Hobson's direct claims, just as Hobson succeeded in defeating all of the State's direct claims. The State

successfully defeated the Contractors' attempt to rewrite the Contract and turn it into a cost-plus contract. Once its counter cross-claim was dismissed, the State settled the case with SE/Z for $225,000 or 11.4% of SE/Z's original demand. As such, the State was successful in defending against 88% of SE/Z's claim. This was directly related to the State successfully defeating SE/Z's attempt to convert the fixed-price contract into a cost-plus contract. As the district court held: "The essential claim of the contractors was that the State's termination for convenience had the effect of converting the contract from a Fixed Price Contract to a Cost Plus Contract. Such was not the case. In that respect, the State ultimately prevailed." (R. Vol. VIII, 1558).

As the district court concluded, the State prevailed in part and the Contractors prevailed in part. "This Court has held that when both parties are partially successful, it is within the district court's discretion to decline an award of attorney fees to either side." Jorgensen, supra, at 538, 1127; *see* Viking Construction, Inc. v. Hayden Lake Irr. Dist., 149 Idaho 187, 200, 233 P.3d 118, 131 (2010) (party not entitled to attorney fees under I.C. § 12-117 because court found both parties prevailed in part); In re Board of Psychologist Examiners' Final Order Case No. PSY-PyB-01-010-002, 148 Idaho 542, 548, 224 P.3d 1131, 1137 (2010) ("Therefore, because both parties have prevailed in part on appeal, neither of them is the prevailing party."). Since the Contractors and the State prevailed in part, neither is a prevailing party.

b. If a Rule 54(d)(1)(B) Prevailing Party Analysis Applies, the Court Should Review This Aspect of the Decision For an Abuse of Discretion

This Court concluded that it could exercise free review of a district court's decision whether to award attorney fees under § I.C. 12-117 because the two predicates for a determination were "more in the nature of legal conclusions, since the first one depends upon

successfully achieving some form of favorable relief that properly can be granted by the court to the 'person,' and the other depends upon the assessment of conduct of the other party..." Rincover, 132 Idaho at 549-550, 976 P.2d at 475-476. If a Rule 54(d)(1)(B) analysis applies to determining whether one is a prevailing party for the first predicate, it is no longer in the nature of a legal conclusion. It is more in the nature of a factual finding more suitable to an abuse of discretion standard as actually applies to a district court's determination of a prevailing party under Rule 54(d)(1)(B). Polk v. Larrabee, 135 Idaho 303, 17 P.3d 247, 256 (2000); Adams v. Krueger, 124 Idaho 97, 856 P.2d 864, 867 (1993). Therefore, if the prevailing party status for the purpose of the first predicate of I.C. § 12-117 is determined through the same analysis used to determine a prevailing party under Rule 54(d)(1)(B), then an abuse of discretion standard should apply to the prevailing party determination.

c. The district court did not abuse its discretion by determining there was no overall prevailing party

If an abuse of discretion standard applies to the first predicate to recovery of attorney fees under I.C. § 12-117, then such determination of prevailing party status is committed to the sound discretion of the district court and will not be disturbed absent an abuse of that discretion. Jorgensen v. Coppedge, 148 Idaho 536, 538, 224 P.3d 1125, 1127 (2010). "When examining whether a district court abused its discretion, this Court considers whether the district court: (1) perceived the issue as one of discretion; (2) acted within the outer boundaries of that discretion and consistently within the applicable legal standards; and (3) reached its decision by an exercise of reason." Id. Only in the rarest of circumstances has the Court reversed a district court's determination of which party prevailed. Id.

The district court perceived the issue of determining the prevailing party as one of discretion. In fact, the district court recited this standard at the beginning of its discussion of the prevailing party status. (R. Vol. VIII, 1556:9). The district court stated: "The determination of which is the prevailing party and to what extent is within the discretion of the trial court." Id; citing J.R. Simplot Co. v. W. heritage Ins. Co., 132 Idaho 582, 584, 977 P.2d 196, 198 (1999). The district court also perceived the issue of costs as discretionary. (R. Vol. VIII, 1557:5-8); Citing I.R.C.P. 54(d)(1)(B); Van Brunt v. Stoddard, 136 Idaho 681, 689, 39 P.3d 621, 629 (2001). Therefore, the district court clearly perceived the issue as one of discretion.

The district court also acted within the boundaries of that discretion and consistently within applicable legal standards. The district court correctly cited the applicable legal standard for determining prevailing party status. (R. Vol. VIII, pp. 1556-1557). The district court then rendered its decision by an exercise of reason using the applicable legal standards. The district court began by summarizing the issues in the lawsuit. It noted that the State terminated its contract with SE/Z for convenience. (R. Vol. VIII, p. 1558). "The essential claim of the contractors was that the State's termination for convenience had the effect of converting the contract from a Fixed Price Contract to a Cost Plus Contract. Such was not the case. In that respect, the State ultimately prevailed." (R. Vol. VIII, p. 1558) The district court also noted that the State theorized that the contract allowed it to pursue offsets and counterclaims. Although the district court allowed the State to pursue its offsets and counterclaims during the first trial, it decided to disallow those claims on the eve of the second trial. (R. Vol. VIII, pp. 1558-1559). The district court reasoned:

> When both parties are considered prevailing, the Court may, in its discretion, decline an award of costs or fees to either side. *Shore v. Peterson*, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009); *Ace Realty Inc. v. Anderson*, 106 Idaho 742, 750, 682 P.2d 1289, 1297 (Ct.App. 1984); *see also Israel v. Leachman*, 139 Idaho 24, 27, 72 P.3d 864, 867 (2003). In the overall case, both parties were required to expend considerable resources both asserting and defending claims. Hobson's initial claim against SE/Z and the State sought more than $1.5 million; SE/Z's cross-claim against the State sought more than $1.9 million; and the State's counter-claim sought more than $2.6 million. In the end, the case settled with the State paying SE/Z $225,000.00 with no admission of liability. Over the course of five years, numerous other claims were addressed through motion hearings. Each party prepared for and conducted three weeks of trial which ended in a mistrial. Each party prevailed on some issues and each party lost on other issues. For all these reasons, the Court orders each party to bear its own costs and fees.

(R. Vol. VIII, p. 1559).

The district court concluded that the State was successful in limiting the contractors claims and the Contractors were successful in narrowing the State's counterclaims and offsets. In that sense, both parties prevailed. However, the district court exercised its discretion and determined that neither party was a "prevailing party" entitled to fees or costs. Since the district court perceived the issue as one of discretion and acted within the boundaries of that discretion, acted within applicable legal standards, and reached its decision by an exercise of reason, the district court did not abuse its discretion by denying costs and fees. Therefore, this Court should affirm the district court's decision that there was no overall prevailing party.

3. The Contractors are not entitled to attorney fees under I.C. § 12-117(1) because the State acted with a reasonable basis in fact or law

The Contractors repeatedly assert in their briefs that the State "erroneously misinterpreted," "falsely asserted," and "fabricated" an unsupported and unreasonable interpretation of the Contract. Nothing could be further from the truth. In fact, the district court

agreed with the State's interpretation of the Contract throughout the entire litigation. The district court simply changed its mind on the eve of the second trial on an issue which it had previously determined was a question of fact. Actually, the district court rejected the Contractors' interpretation of the Contract and it is incredulous for them to claim that the State's interpretation lacked a reasonable basis in fact or law.

An award of fees under I.C. § 12-117 requires not only that a party be the prevailing party, but that the non-prevailing party to have acted without a reasonable basis in fact or law. If the Court determines that the Contractors are prevailing parties or that the district court abused its discretion in that regard, the Contractors are still not entitled to an award of attorney fees under I.C. § 12-117 because the State acted with a reasonable basis in fact and law.

Typically, for purposes of I.C. § 12-117, the Court looks to determine whether there was no authority at all for an agency's actions or whether the law was unclear or unsettled as to whether the agency had the ability to act. Ralph Naylor Farms, LLC v. Latah County, 144 Idaho 806, 809, 172 P.3d 1081, 1084 (2007). In this case, the Contractors are not arguing that the State lacked authority to do the act which lead to the dispute between the parties; i.e. terminating SE/Z's contract for convenience. Rather, the Contractors take exception with the State's interpretation of the Contract and its position on the effect of the termination for convenience. They argue that since the district court barred the State's cross-claims, the State acted without authority to bring its cross-claim. (Hobson's Brief, p. 27). However, having authority to bring a cross-claim and having a reasonable basis in law or fact for the cross-claim are separate issues. Clearly, the State had the authority to defend itself and pursue counter and cross-claims after it

got sued by the Contractors. The real question for purposes of this appeal is whether the State had a reasonable basis in law or fact for bringing its cross-claims. The answer to that question is a resounding "yes."

For purposes of I.C. § 12-117, this Court may also look to its decisions regarding awards of fees under I.C. § 12-121 because the requirement that the party acted without a reasonable basis is similar to the requirement of I.C. § 12-121 that the case be brought, pursued or defended frivolously, unreasonably, or without foundation. Total Success Investments, LLC v. Ada County Hwy. Dist., 148 Idaho 688, 695-696, 227 P.3d 942, 949-950 (Ct. App. 2010), citing Nation v. State, Dept. of Correction, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007). Under I.C. § 12-121, attorney fees should only be awarded "if the non-prevailing party advocates a plainly fallacious, and, therefore, not fairly debatable, position." Lowery v. Bd of Cnty Com'rs for Ada County, 115 Idaho 64, 69, 764 P.2d 431, 436 (1988). A defense is not frivolous or groundless merely because it fails. Id. "A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct." Id., quoting Wing v. Amalgamated Sugar Co., 106 Idaho 905, 911, 684 P.2d 307, 313 (Ct. App.1984).

As indicated, the State terminated SE/Z's Contract for convenience as allowed under the Contract. The termination for convenience provisions are located in Article 14.4 of the Contract. Subparagraph 14.4.1 provided:

> 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

(R. Vol. II, p. 397).

Subparagraph 14.4.3, as amended by the Supplementary Conditions provided:

> 14.4.3 In the case of such termination for the Owner convenience, the Contractor shall be entitled to receive payment from the Owner on the same basis provided in Subparagraph 14.1.3, as modified.

(R. Vol. III, p. 415).

As modified, Subparagraph 14.1.3 provided:

> 14.1.3 If one of the reasons described in Subparagraph 14.1.1 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead and profit.

(R. Vol. II, p. 396; Vol. III, p. 415).

> 1.1.3 The term 'Work' means the construction and services required by the Contract Documents, whether completed or partially completed, and includes another labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

(R. Vol. II, p. 362).

The Contractors argued that Subparagraph 14.1.3 allowed them to seek recovery of all their costs on the Project and the State, by virtue of terminating the Contract for convenience, could not pursue any claims, offsets, or defenses to the Contractors' claim. The State argued that Subparagraph 14.1.3, in conjunction with the definition of "Work," only allowed the Contractors to recover amounts for work executed up to the point of termination, as long as it complied with the plans and specifications. The State also argued that Subparagraph 13.4.2 allowed it to pursue claims, offsets, and defenses arising out of the Contractors' defective work which was discovered after their lawsuit was filed. Subparagraph 13.4.2 provided:

> 13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(R. Vol. II, p. 394).

As discussed below, the State had a reasonable basis in fact or law to pursue its claims, offsets, and defenses against the Contractors based upon the above quoted Contract language. The State filed its cross-claim based upon discovering, after SE/Z was terminated and after the Contractors filed suit, construction defects that were in gross disregard to the Project plans and specifications. These defects resulted in an unsafe Lab that would have posed grave danger to the employees of the Lab, as well as individuals who work or live near the Project. Moreover, the State was facing a situation in which it was going to have to spend more than the original contract price to repair the Contractors' defective work and complete the Lab in accordance with the plans and specifications. Under these circumstances, the State's decision to pursue its claims, offsets, and defenses was entirely reasonable.

a. The State had a reasonable basis under Idaho law, federal law, and the Contract language to assert its cross-claim

At the outset of this case on April 14, 2006, the Contactors brought motions to preclude the State from asserting its claims, offsets, and defenses in this matter based upon the termination for convenience. (R. Vol. I, p. 9). In its supporting memorandum, SE/Z acknowledged "there are no Idaho cases analyzing the effect of DPW's termination for convenience at issue in this matter" and, therefore, the Contractors relied exclusively on federal case law to support their motion. (Memorandum of Points and Authorities in Support of SE/Z Construction, LLC's

Motion for Partial Summary Judgment, p. 8, filed April 14, 2006).[4] In essence, the Contractors argued that, under federal law, simply because the State chose to terminate SE/Z's Contract for convenience, rather than for cause, the State could not assert any claims, offsets or defenses based upon the Contractors' defective work. In opposition, the State filed numerous affidavits: of counsel; Jan Frew; Elaine Hill; Joe Rutledge and Albert Munio as well as a Memorandum in Opposition outlining the factual and legal basis for its defenses, offsets and claims.[5] As for the specific facts, the affidavits outlined the history of the Project, problems that arose on the Project, the difficulties the State had with regard to welding issues and others, the Project stalling due to inability to obtain balance, the termination of SE/Z for convenience and the subsequent discovery of the grossly defective work performed by Hobson and SE/Z. As for the reasonable basis in law, the Contract provided that it should be governed by the law of Idaho, not federal law. As SE/Z acknowledged, no Idaho cases had analyzed the effect of the termination for convenience provision at issue. Therefore, this was a case of first impression. However, that does not justify leaping into a body of general federal common law concerning termination for convenience clauses, especially when those cases turn on the particular language used in the federal contracts involved. Instead, the State argued that the Contract should be interpreted using Idaho contract interpretation principles. (Defendant State of Idaho's Opposition to Hobson Fabricating Corp.'s and SE/Z Construction LLC's Partial Summary Judgment, pp. 18-30, filed May 22, 2006). Subparagraph 13.4.2 of the Contract provided that no action on the part of the

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[4] SE/Z's Memorandum has been submitted with the States Motion to Augment the Record.

[5] The State's Memorandum in Opposition and the affidavits have been submitted with the State's Motion to Augment the Record.

parties, such as a termination of the Contract, would constitute a waiver of the parties' rights under the Contract. As such, the Contract itself indicated the State's decision to terminate the Contract for convenience did not preclude the State from asserting other rights under the contract, including breaches, defenses and offsets.

Moreover, even the federal case law relied upon by the Contractors in seeking summary judgment provided a reasonable basis for the State to pursue its claims, offsets and defenses. First, the case upon which the Contractors relied most heavily in their briefing, Appeal of New York Shipbuilding Co., 1972 WL 1601, 73-1 BCA P 9852 (ASBCA 1972), had been explicitly refuted:

> Appellant relies on the rule set forth in New York Shipbuilding Co. . . . that Government offset claims for corrective work are not recoverable where there has been a convenience termination. . . .
>
> . . . [W]e hold that the rule in New York Shipbuilding does not serve as an automatic bar to Respondent's counterclaims and that they should be considered on their merits. . . . The express agreement of the parties on the question takes precedence over any contrary holding, particularly of another board whose determinations, while accorded great respect, are not controlling on us.
>
> * * *
>
> [T]he continued applicability of New York Shipbuilding and its forerunners is seriously in doubt.
>
> * * *
>
> Finally, even if New York Shipbuilding is still viable, it is distinguishable here on the facts. New York Shipbuilding dealt with a termination for convenience early in the life of the contract before the contractor was able to correct deficiencies. . . . In this case, however, termination occurred very late in performance, after Appellant had delivered virtually all the hardware to the site, and had ample time

> to make corrections . ... Under such circumstances, it is questionable if New York Shipbuilding ever controlled this case.

Aydin Corp., 1989 WL 74785, 89-3 BCA P 22044 (EBCA 1989) (emphasis added); see also Appeal of Air-Cool, Inc., 1987 WL 46144, 88-1 BCA P 20399 (ASBCA 1987) (recognizing that it is questionable whether the rule set forth in New York Shipbuilding will continue to be followed.)

Second, despite the Contractors' attempt to paint a picture of "uniform" and "well-established" federal law supporting their argument, several federal courts had specifically held that counter-claims can be raised following a termination for convenience, as can offsets of the contractor's claimed costs. See, e.g., Appeal of E.A. Cowen Constr., Inc., 1966 WL 651, 66-2 BCA P 6060 (ASBCA 1966) (allowing for a counter-claim raised by the federal Government following its termination for convenience of a contract); Timberland Paving and Constr. Co. v. The United States, 18 Cl. Ct. 129, 141 (Cl. Ct. 1989) (holding that the federal Government's offset for liquidated damages against the contractor's payment claims was allowable following a termination for convenience).

Lastly, even under the strictest federal cases dealing with termination for convenience, the case law has held "that alleged deficiencies stemm[ing] from gross disregard by appellant of its contractual obligations [and] the costs of performing such grossly deficient work would be considered unreasonable and hence unallowable" following a termination for convenience. *See, e.g.*, New York Shipbuilding, 1972 WL 1601, 73-1 BCA P 9852; Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987). Under such cases, the costs of performing work

are not allowable where "the government established that any defects resulted from [the contractor's] gross disregard of its contractual obligations or that any defects are so extensive as to render [the contractor's] costs unreasonable." Best Foam Fabricators, Inc. v. United States, 38 Fed. Cl. 627, 641 (Fed. Cl. 1997). Even New York Shipbuilding, the case most heavily relied upon by the Contractors, provides an exception for offsets when "it is established that the defective production resulted from the contractor's own fault or folly or careless conduct of the work or other disregard of his contractual duties." New York Shipbuilding, 1772 WL 1601, 73-1 BCA P 9852. The same reasoning applies to affirmative claims stemming from such grossly deficient, unreasonable, grossly non-conforming, and extensively defective work. *See* E.A. Cowen Construction, 1966 WL 651, 66-2 BCA P 6060.

After reading the extensive briefing and hearing oral argument, the district court denied the Contractors' motion to preclude the State's claims, offsets and defenses. In ruling on the motion, the district court found that the federal case law relied upon by the Contractors was not controlling, the principles set forth in New York Shipbuilding had been called into question, and despite the holding in New York Shipbuilding, the Contractors' entitlement under subparagraph 14.1.3 did not preclude the State from asserting its affirmative defenses and claims. (R. Vol. II, pp. 216-218). The district court turned to Idaho contract interpretation principles and held that "Subparagraph 13.4.2 preserves the State's right to sue Hobson and SE/Z for breach of contract in connection with their alleged deficient workmanship." (R. Vol. II, p. 218). Therefore, under Idaho law, federal law, and the Contract language itself, the State had a reasonable basis to assert its claims, offsets, and defenses.

b. The State had a reasonable basis in fact or law for arguing that strict compliance with the claim notice provision was not required

On October 27, 2006, SE/Z filed another motion for partial summary judgment arguing the State waived its right to pursue its claims, offsets, and defenses. (R. Vol. I, pp. 10-11). Hobson joined in the motion. (R. Vol. I, p. 11). In essence, the Contractors argued that the State was required to strictly comply with the notice provision set forth in Article 4.3.2 of the Contract as a condition precedent to pursuing its claims. (Memorandum in Support of SE/Z Construction, LLC's Motion for Partial Summary Judgment, p. 11, filed October 27, 2006).[6] Article 4.3.2 provided in pertinent part: "A Claim by either party must be made by written notice to the Architect within ten (10) days from the date that the Claimant knew or should have known of the event or condition. Unless the Claim is made within the aforementioned time requirements, it shall be deemed to be waived." (R. Vol. II, p. 373). Again, SE/Z acknowledged "there does not appear to be any Idaho case law interpreting the Contract provisions at issue in this case." As such, this was also a case of first impression. (Memorandum in Support of SE/Z Construction, LLC's Motion for Partial Summary Judgment, p. 12, filed October 27, 2006).

The State opposed the motion with a reasonable basis. Specifically, the State argued and provided evidence establishing SE/Z and Hobson had actual notice with regard to at least portions of the defective work and that neither SE/Z nor Hobson were prejudiced by not having received notice that strictly complied with the Contract provisions. (Defendant State of Idaho's Opposition to SE/Z Construction, LLC's Motion for Partial Summary Judgment and Plaintiff

[6] SE/Z's Memorandum in Support of its Motion for Partial Summary Judgment has been submitted with the State's Motion to Augment the Record.

Hobson Fabricating Corp.'s Joinder in SE/Z's Motion, pp. 14-23).[7] The evidence indicated that the Contractors' defects were so egregious that they had to have actual knowledge of their existence before they were deliberately concealed and hidden from the State. The State further cited to several Idaho cases holding that strict compliance with contractual notice requirements is not always required, including in situations with actual notice and a lack of prejudice. *See* Quinn v. Hartford Accident & Indemnity Co., 71 Idaho 449, 452, 232 P.2d 965, 966 (1951) and Leach v. Farmer's Automobile Interinsurance Exchange, 70 Idaho 156, 161, 159, 213 P.2d 920, 922-23 (1950).

> As in Quinn and Leach, the Idaho courts have held in a variety of circumstances that a party need not strictly comply with contractual notice provisions. See Olson Bros. v. Hurd, 20 Idaho 47, 116 P. 358, 361 (1911) (holding that a party sufficiently complied with the notice provisions of a sales contract requiring notice provided to a particular location by providing oral notice to the other party at a different location); Thompson v. Fairchild, 93 Idaho 584, 587, 468 P.2d 316, 319 (1970) (holding, with respect to notice of forfeiture under a land sale contract: "[W]hether or not the formal requirements regarding the giving of notice as prescribed by the written instrument were complied with is immaterial where it is clear that notice was in fact received. The record further demonstrates that appellant was in no way prejudiced . . .."); Wickahoney Sheep Co. v. Sewell, 273 F.2d 767 (9th Cir. 1959) (applying Idaho law in a diversity jurisdiction case, and holding: "The purpose of notice of default in the usual case is to give the party allegedly in default an opportunity to remedy the default and meet his obligation, and notice in the prescribed manner [under a contract] is not required where a party has actual notice and has not suffered prejudice.") (internal citations omitted).
>
> This is equally true in the construction context. In Beco v. Roberts & Sons Constr. Co., Inc., the Idaho Supreme Court allowed a subcontractor to pursue his claims for extra work against the prime contractor on a construction project. Beco, 114 Idaho 704, 760 P.2d 1120 (1988). This was despite the fact that, as the

[7] The State's Opposition to SE/Z's Motion for Partial Summary Judgment has been submitted with the State's Motion to Augment the Record.

> dissent in Beco noted, the subcontractor did not comply with the contract's notice provisions, which were remarkably similar to the notice provisions in the Contract at hand. See id. at 719-20, 760 P.2d at 1135-36. The contract provided "that extra work claims 'shall be deemed waived by Subcontractor unless written notice thereof is given the Contractor within ten days after the date of its origin." Id. at 719, 760 P.2d at 1135. Although the subcontractor failed to provide written notice of its claims for extra work until months after the ten-day period had elapsed, the Court allowed the subcontractor's claims to proceed and upheld the jury's verdict in favor of the subcontractor on its claims for extra work. See also Consolidated Concrete Co. v. Empire West Constr. Co., Inc., 100 Idaho 234, 236-37, 596 P.2d 106, 108-09 (1979) (holding that a subcontractor need not strictly comply with the statutory notice provisions contained in Idaho Code § 54-1927, governing claims for labor, services, or equipment provided on a public works construction project, and noting that the question of whether a party has received notice "is a question of fact.") (emphasis added); accord Sch. Dist. No. 91, Bonneville Cty., State of Idaho, For the Use & Benefit of Idaho Concrete Prods., Inc. v. Taysom, 94 Idaho 599, 603, 495 P.2d 5, 9 (1972); see also Hoel-Steffen Constr. Co. v. United States, 456 F.2d 760, 768 (U.S.Cl.Ct. 1972) (holding that "notice provisions in contract-adjustment clauses [should] not be applied too technically and illiberally where the [other party] is quite aware of the operative facts."); Calfon Constr. Inc. v. United States, 18 Cl.Ct. 426, 439 (U.S. Cl. Ct. 1989) (emphasizing the issue of whether a party has knowledge of the essential facts when assessing whether additional provision of notice was necessary under a contract-adjustment clause.)

Id., at pp. 15-16.

In accordance with the foregoing precedent, the State argued that it was appropriate for the district court to consider whether the Contractors had actual notice of the underlying facts supporting the State's claims and whether they were prejudiced by any lack of compliance with the notice provisions. The State also clarified that by the time it discovered the significant latent defects, it had already been sued by the Contractors. Providing written notice to the Project Architect who was no longer involved with the Project, after litigation had commenced, would have been illogical and of no benefit to any party.

On January 4, 2007, the district court heard argument on these motions. In denying the Contractors' motions, the Court noted that "Idaho law is silent on whether or not strict or substantial compliance is required in the precise situation before the Court. There is a split of authority over the issue of strict or substantial compliance with notice provisions." (R. Vol. II, p. 245). The district court found:

> DPW has raised genuine issues of fact regarding whether or not SE/Z received actual notice of the allegations contained in the compliance and whether or not SE/Z was prejudiced by the lack of strict compliance. See Defendant State of Idaho's Opposition to SE/Z Construction, LLC's Motion for Partial Summary Judgment and Plaintiff Hobson Fabricating Corp.'s Joinder in SE/Z's Motion, p. 17-22 (summarizing numerous affidavits that create genuine issue of material fact over whether or not SE/Z had actual notice of the alleged breaches of contract and whether or not SE/Z suffered any prejudice by not receiving notice in strict compliance with the contract). Therefore, the Court denies SE/Z's motion for summary judgment based on the failure to strictly comply with the notice provision.

(R. Vol. II, pp. 245-246).

Alternatively, the Court further noted that even under a strict compliance standard, a genuine issue of material fact existed as to whether SE/Z waived its right to strict compliance by having knowledge of the defective work and deceptively masking the same. (R. Vol. II, p. 246). Specifically, the district court found that the State's allegations that the Contractors were aware of their deficient work and, rather than rectify the situation, deceptively masked their substandard work, was supported by the affidavits submitted. (R. Vol. II, p. 247).

On March 19, 2007, SE/Z filed a Motion to Reconsider the Court's February 27, 2007, ruling on the Notice issue. (R. Vol. I, p. 14). In denying the motion for reconsideration, the Court stated:

> The contractors also presented deposition testimony of certain people who were themselves unaware of any deceptive attempts on the part of the contractors to hide poor workmanship. However, the State presented evidence that inspections after the termination of the contract unveiled serious concealed defects with the contractor's work. Thus, SE/Z and Hobson have not eliminated the questions of fact that preclude the granting of the Motion for Summary Judgment.

(Order Denying Motion for Reconsideration, p. 4).[8]

SE/Z filed a motion in limine on September 15, 2008, requesting the district court to require the State to show it provided actual notice and an opportunity to cure defective work to SE/Z prior to allowing any presentation of the State's claims. (R. Vol. II, pp. 288A-288D; 288X-288EE). The district court denied this motion as an untimely motion for summary judgment. Subsequently, SE/Z filed a motion for reconsideration which was further denied based upon the showing made by the State of actual notice, lack of prejudice and SE/Z's waiver of strict compliance. (R. Vol. II, pp. 299UU-288JJJ).

During the trial, on October 30, 2008, the Court explained:

THE COURT: But the whole question of notice, the reason I didn't grant summary judgment on that point months ago was the question of waiver and prejudice. And I think that there is – I mean, to be just slightly more specific, I had ruled that there was a genuine issue of material fact regarding SE/Z getting "actual" notice and whether or not there was no prejudice suffered by lack of strict compliance with the notice requirements. So that's an open question, and it seems to me to be sort of disingenuous of me to reverse myself on that just in the interest of

[8] The Order Denying Motion for Reconsideration has been submitted with the State's Motion to Augment the Record.

time and just say, sorry, they didn't send notice
and they can't pursue their claim.

THE COURT: And if there's a genuine issue
of material fact, with respect to that issue,
which it seems to me that there's a pretty high
likelihood that there will be a genuine issue of
material fact that would remain about actual
notice and nonprejudice. I mean, it may not be
just crystal clear that there was no prejudice or
that there was prejudice, but it seems to me it's
still going to be a factual determination by a
jury.

(R. Vol. IV, pp. 683-684).

Even though the district court thought it would be disingenuous to reverse itself on this issue, that is exactly what it did when it issued its Memorandum Decision and Order on Plaintiff's Motions in Limine on March 26, 2010. However, that does not change the fact that the State had a reasonable basis in fact and law to argue strict compliance with the notice provision was not required in this case.

c. The Court is generally reluctant to find an action unreasonable when dealing with questions of first impression

In Ciszek v. Kootenai County Bd of Com'rs, this court recently explained in conjunction with a claim for attorney fees under I.C. § 12-117 that "[w]hen dealing with an issue of first impression, this court is generally reluctant to find an action unreasonable. 151 Idaho 123, 254 P.3d 24, 36 (2011); *see also*, Kootenai Med. Ctr. ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 886, 216 P.3d 630, 644 (2009); Wheeler v. Idaho Dept. of health and Welfare, 147 Idaho 257, 266-67, 207 P.3d 988, 997-98 (2009). The issues with which the

Contractors argue the State's position lacked a reasonable basis in law or fact were, admittedly, questions of first impression.

SE/Z and the district court specifically acknowledged that the issues involved were questions of first impression. In State of Idaho, Dept. of Finance, v. Resource Service Co, Inc., 134 Idaho 282, 1 P.3d 783 (2000) ("RSC II"), this Court discussed I.C. §12-117 as applied to a situation involving a question of first impression. The Department of Finance brought suit against Resource Service Company, Inc. ("RSC"), alleging RSC marketed unregistered securities by soliciting a $40.00 fee from customers to enter their names in a BLM lottery for gas and oil leases. 134 Idaho at 283, 1 P.3d at 784. The district court granted summary judgment for the Department of Finance and RSC appealed. In Dept. of Finance v. Resource Service Co., 130 Idaho 877, 950 P.2d 249 (1997) ("RSC I"), this Court reversed the district court, holding that RSC's program did not constitute an investment contract and, accordingly, was not governed by the Idaho Securities Act. Id. Pursuant to the RSC I decision, the district court dismissed the Department's complaint and RSC requested attorney fees pursuant to I.C. § 12-117. Id. The district court denied the request because it could not conclude the Department acted without a reasonable basis in fact or law. Id. RSC appealed.

RSC argued that because this Court found that its program did not involve the sale of securities in RSC I, the Department acted without a reasonable basis in law or fact. However, this Court stated: "The fact that this Court subsequently determined that RSC's program did not constitute a security does not, in and of itself, establish that the Department acted unreasonably or without legal or factual basis in maintaining suit against RSC." Id., at 284, 785. The crux of

RSC's argument was that the Department refused to find merit in a particular case which this Court relied upon in rendering its decision in RSC I. However, the Court noted that while it cited favorably to the case, other courts addressing the issue have found to the contrary. The issue of whether the lottery program constituted a "security" was a question of first impression in Idaho. In analyzing this case, the Court reviewed two other cases involving I.C. §12-117 and questions of first impression: Rincover v. State, Dept. of Finance, 132 Idaho 547, 976 P.2d 473 (1999); and Treasure Valley Concrete, Inc. v. State, 132 Idaho 673, 978 P.2d 233 (1999). In both cases, the State did not prevail on its arguments, but since the issues were questions of first impression, the Court could not conclude the Stated acted without a reasonable basis in fact or law.

Likewise, in this case the crux of the Contractors' argument is that the terms of the Contract were clear and unambiguous and since the district court ultimately decided the State could not pursue its claims and offsets that necessarily means the State acted without a reasonable basis in fact or law. However, just because the district court eventually agreed with the Contractors on these issues, does not mean the State did not have a reasonable basis in fact or law for its position. In light of the lack of case law in Idaho on these issues, and the decisions from other jurisdictions cited by the State in support of its position, the State had a reasonable basis in fact and law for the arguments it proffered.

d. The District Court agreed with the State's interpretation of the clear and unambiguous provisions of the Contract

SE/Z repeatedly states in its briefing that the Contract between it and the State was clear and unambiguous. SE/Z also argues that the State's interpretation of the Contract must

necessarily be unreasonable even if the terms were ambiguous because those ambiguities must be construed against the State as the drafter of the Contract, "effectively nullifying its interpretation." (SE/Z brief p.14). SE/Z's argument is illogical. "A contract term is ambiguous when there are two different reasonable interpretations or the language is nonsensical." Knipe Land Co., v. Robertson, 2011 WL 2039635, *4 (Idaho, May 26, 2011) (emphasis added), quoting Potlatch Education Ass'n v. Potlatch School District No. 285, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010). If the Contract terms were ambiguous, and in order to be ambiguous the terms must be susceptible to differing reasonable interpretations, then by definition the State's interpretation was reasonable.

In reality, the district court only analyzed a handful of the provisions in its discussions as to what was clear and unambiguous. It held subparagraph 14.1.3 was clear and unambiguous. (R. Vol. II, p. 216). Subparagraph 14.4.3 was part of the Termination for Convenience provisions and provided:

> In the case of such termination for the Owner convenience, the Contractor shall be entitled to receive payment from the Owner on the same basis provided n Subparagraph 14.1.3.
>
> Subparagraph 14.1.3 stated:
>
> If one of the reasons described in Subparagraph 14.1.1 exists, the Contractor may, upon seven days' written notice to the Owner and Architect, terminate the Contract and recover from the owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, [and] profit.

(R. Vol. II, p. 216).

The district court held this language was clear and unambiguous and entitled SE/Z to recover the losses described therein. Id. Interestingly, it was by this Subparagraph that SE/Z claimed it was allowed to recover all of its costs incurred on the Project, totaling $1.9 million. SE/Z argued that the definition of "Work" was the equivalent to the "total cost method" of establishing damages. (R. Vol. IV, p. 627). The State disputed the Contractors' definition of "Work," and their claim to all costs under the provision. The district court agreed with State's interpretation of this Subparagraph and held that SE/Z could not use the "total cost method" to establish its damages. Id. Rather, the burden would be upon SE/Z to prove the "Work" that had been executed but for which it had not yet been paid, and that such "Work" was done in accordance with the plans and specifications. (R. Vol. IV, p. 623, 627). Therefore, since the district court agreed with the State's interpretation of this provision, the State's position had a reasonable basis in fact and law. Furthermore, since this Subparagraph was deemed clear and unambiguous, it was by definition only susceptible to one reasonable interpretation. The district court agreed with the State's interpretation. Therefore, by definition, SE/Z's interpretation was unreasonable. Since SE/Z's interpretation was unreasonable, it did not have a reasonable basis in fact or law for its position.

The other provisions the district court determined were clear and unambiguous were Subparagraphs 7.2.3 and 7.2.4 which pertain to Change Orders. (R. Vol. IV, p. 406). The Contractors' claim to all of their costs necessarily included amounts for which they had already been paid pursuant to a change order. The district court held: "The contract language is not ambiguous and clearly states that the waiver of future claims that accompanies accepting a

change order applies to both direct and indirect costs. . . . The plain language of the contract bars SE/Z from claiming any additional costs associated with the hot gas bypass." (R. Vol. II, p. 258). This holding was eventually extended to apply to all change orders. (R. Vol. IV, p. 624). Therefore, this is another example of the district court agreeing with the State's interpretation of a clear and unambiguous provision, rendering SE/Z's interpretation unreasonable and the State's interpretation reasonable.

SE/Z also argues that the State's interpretation of the clear and unambiguous notice requirement was unreasonable. However, the dispute over this provision had nothing to do with interpreting its language. Rather, as the district court explained, "the question is not whether the contractual provision is ambiguous; rather the question is whether actual notice, together with lack of prejudice, is an exception to the strict notice requirement. Under Idaho case law cited in the original decision, the answer to that question must be answered in the affirmative." (Order Denying Motion for Reconsideration, p. 4). As the district court acknowledged, the State had a reasonable basis in Idaho law for its position. While the district court originally determined there was a question of fact regarding whether SE/Z was prejudiced by the lack of strict compliance, it ultimately reversed itself and decided SE/Z was prejudiced because it did not have the opportunity to address the alleged defects. However, that does not change the fact that the State's position was supported by a reasonable basis in Idaho law that an exception to strict compliance of a notice requirement could apply.

Lastly, SE/Z argues that the State's position that it should be allowed to seek affirmative claims and offsets was unreasonable. In ruling upon the Contractors' first motions for partial

summary judgment seeking to dismiss the State's claims and offsets, the district court held that Subparagraph 13.4.2 preserved the State's right to sue the Contractors for breach of contract in connection with their deficient work. (R. Vol. II, p. 218). While the district court did not specifically state that this provision was clear and unambiguous, it did agree with the State's interpretation of the provision. Despite SE/Z's contention, the district court never changed its position with respect to this provision or the State's interpretation thereof. In its Memorandum Decision and Order on Plaintiff's Motion in Limine in which the court barred the State's cross-claims and offsets, the district court stated: "While [subparagraph 13.4.2] on its face allows the State to pursue its own independent claims against the contractors, the Court finds that its ability to pursue those actions is otherwise foreclosed by its failure to provide notice and the opportunity to cure." (R. Vol. IV, p. 626). Accordingly, the district court reiterated that the State's interpretation of the contract language was correct in that it allowed the State to pursue affirmative claims against SE/Z. The district court simply reversed itself on what it had previously determined was a question of fact. Therefore, the State had a reasonable basis in Idaho law to bring its affirmative claims and offsets.

e. Considering all factors, the State had a reasonable basis in fact or law for asserting its cross-claims, offsets, and defenses in this case

In mid October 2008, the case proceeded to trial and a mistrial was declared prior to the State's opportunity to put on its case in chief, and establish the facts necessary to support its claims, offsets and defenses. The Court further ordered a freeze on discovery and motion practice other than motions in limine regarding specific evidence issues. As such, the case remained essentially dormant until March 2010, at which time Hobson filed its Motions in

Limine and Motion to Dismiss Rudeen. Hobson's motion in limine raised the exact same arguments previously raised in the summary judgment motions regarding the effect of the termination for convenience and notice requirements. SE/Z joined in Hobson's motion. The State objected to the motion as it was an untimely motion for summary judgment veiled as a motion in limine and in direct contravention of the district court's order freezing motion practice. (R. Vol. II, pp. 297-301). Despite the State's objection, and the freeze on motion practice, the district court allowed the Contractors' motion. The district court reversed its previous rulings on the issues and granted the Contractors' motion in limine which precluded the State from asserting any claim or offset with regard to defective work discovered after the termination for convenience, and for which no notice and opportunity to cure had been provided. (R. Vol. IV, pp. 730-742). On the other hand, it is important to note that the district court did not bar the State from asserting its defenses to the Contractors' claims based upon the work not meeting the plans and specifications. The Contractors had attempted to preclude the State from even asserting defenses to their claims, but the State was successful in maintaining its ability to assert as a defense the grossly defective work performed by the Contractors. (R. Vol. IV, p. 737).

Despite the district court's ultimate ruling, the State had a reasonable basis in fact and law to file and assert its claims and offsets in this action. Specifically, the Contractors performed grossly defective work on the Project that was not discovered until after SE/Z was terminated for convenience and after the Contractors filed their lawsuit. Federal case law discussing terminations for convenience provided that certain exceptions to the general rule would allow an owner to assert damages and/or offsets against a contractor terminated for convenience when the

work performed by the contractor was defective and payment of additional funds would not be "reasonable." The Contract provided that a termination for convenience did not preclude the State from pursuing its other rights under the contract, including its right to allege breach of contract and assert offsets. Finally, Idaho law held that strict compliance with notice provisions were not required if it could be shown that the Contractors had actual notice and that such actual notice did not prejudice the Contractors. On repeated occasions, the district court ruled in the State's favor on each of the above issues, finding that genuine issues of material fact existed as to each of these matters.

Unfortunately for the State, it was not allowed to present its evidence to a jury in this matter. However, the mere fact that the State's claims and offsets related to defective work were not successful, does not mean they were without a reasonable basis in fact or law. A defense is not frivolous or groundless merely because it fails. Lowery v. Bd of Cnty Com'rs for Ada County, 115 Idaho at 69; 764 P.2d at 436. "A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct." Id. In light of the evidence presented by the State that the Contractors' work was in gross disregard of the plans and specifications, it was going to cost more than the original contract price to repair the defects, the Contractors were seeking payment of an additional $1.9 million despite those defects, and the fact that these issues presented questions of first impression, the State was entirely reasonable for pursuing its claims, offsets, and defenses.

B. THE CONTRACTORS ARE NOT ENTITLED TO ATTORNEY FEES AS PARTIALLY PREVAILING PARTIES UNDER I.C. § 12-117(2)

1. The Contractors did not argue they were partially prevailing parties to the district court

"The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." Barmore v. Perrone, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008) *quoting* Crowley v. Critchfield, 2007 WL 4245905 at *3 (Idaho, Dec. 5, 2007). In the Contractors' Joint Motion for Award of Costs and Attorney's Fees, the Contractors only sought an award of fees as the overall prevailing parties under I.C. § 12-117(1). (R. Vol. V, pp. 867-870). They did not seek, even in the alternative, an award of fees as partially prevailing parties under I.C. § 12-117(2). Therefore, the Contractors are raising this issue for the first time on appeal and the Court should deny their request for an award of attorney fees under I.C. § 12-117(2).

2. The same test applies under I.C. § 12-117(2) as under I.C. § 12-117(1)

If the Contractors are allowed to seek attorney fees under I.C. § 12-117(2), they need to satisfy the same two-part test applied under I.C. § 12-117(1). I.C. § 12-117(2) provides that if a party prevails on a portion of the case, and the court finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, the court shall award the prevailing party reasonable attorney fees with respect to that portion of the case on which it prevailed. I.C. § 12-117(2).

The Contractors were successful in obtaining a motion in limine limiting the State's ability to present evidence to support its cross-claims in the second trial. However, no judgment was rendered for the Contractors and, therefore, they are not prevailing parties.

Assuming the Contractors are "partially prevailing parties" with respect to that portion of the case in which they successfully prevented the State from presenting evidence as to its cross-claims, they are still not entitled to attorney fees on that portion of the case because the State acted with a reasonable basis in law or fact. As discussed fully above, the interpretation of the termination for convenience provision and whether or not strict compliance with the notice provision was required presented questions of first impression. Idaho and federal case law supported the State's position. The district court agreed with the State's position for five years. In fact, the district court continued to agree with the State's position as to the applicable law. Unfortunately, the district court changed its mind on an issue it had previously determined was a question of fact. Therefore, under these circumstances, the State acted with a reasonable basis in fact or law.

3. If the Contractors are partially prevailing parties, then so is the State

If the Court allows the Contractors to seek attorney fees under I.C. § 12-117(2) for the first time on appeal, then under its free review, it should also determine that the State is a partially prevailing party. As discussed above, the district court held that the State partially prevailed in the case because it successfully defeated the Contractors' attempt to change the fixed-price contract into a cost-plus contract. Therefore, it prevailed on this portion of the case.

The Contractors also did not act with a reasonable basis in fact or law on this issue. Despite the fact the district court determined subparagraph 14.1.3 of the Contract to clearly and unambiguously provide that the Contractors may only seek payment for "Work" that had been performed but not yet paid, the Contractors continued to unreasonably and without any basis in law, argue they were entitled to recover all of their costs under that provision. The district court explained:

> Based upon the Court's July 24, 2006, Memorandum Decision and Order holding that that subparagraph 14.1.3 of the prime contract is clear and unambiguous, the Contractors contend that the defined term "Work" should be interpreted to mean all costs incurred by the Contractors before the termination for convenience.
>
> . . .
>
> Plaintiff requests that the Court rewrite the clear and unambiguous language of the fixed price contract entered into by the parties to include a cost-plus penalty for termination for convenience.
>
> . . .
>
> The Court specifically rejects the contention that the clause converts the fixed price contract into a cost-plus contract. The Court finds that the Contractors are not entitled under a termination to receive money they would not have received if the contract had been completed. The Court further finds the term "Work" does not include all costs incurred by the Contractors, but only includes "construction and services required by the Contract Documents" or, to be specific, the work done under the contract in accordance with the plans and specifications for which the Contractors have not been paid and for which they would have been paid had the contract gone to completion.

(R. Vol. IV, pp. 735-736).

Furthermore, the Contractors did not act with a reasonable basis in fact or law when they attempted to obtain a double recovery of cots associated with work that had been agreed upon

through change orders. The district court held that "[t]he contract language is not ambiguous and clearly states that the waiver of future claims that accompanies accepting a change order applies to both direct and indirect costs...The plain language of the contract bars SE/Z from claiming any additional costs associated with the hot gas by pass." (R. Vol. IV, p. 624).

As is clear from the district court's rulings, the Contractors had neither a reasonable basis in law nor fact for their claim that the Contract language allowed them to seek all their costs in the amount of $1.9 million. It was not supported by the clear and unambiguous language of the Contract or the change orders. This unsubstantiated and unfounded claim drove this litigation and required the State to expend hundreds of thousands of dollars defending this unreasonable demand. Accordingly, upon free review, this Court should find that the State is a partially prevailing party under I.C. § 12-117(2) and entitled to its reasonable costs and attorney fees associated with this portion of the case.

C. THE DISTRICT COURT DID NOT ERR IN AWARDING THE INDIVIDUAL DEFENDANTS THEIR COSTS UNDER I.R.C.P. 54(d)(1)(C)

"The award of costs as a matter of right and discretionary costs is subject to the trial court's discretion." Perry v. Magic Valley Reg. Med. Ctr., 134 Idaho 46, 59, 995 P.2d 816, 829 (2000). The party challenging the award has the burden of proving the trial court's abuse of discretion. Id.

Hobson argues that the district court erred by applying the wrong standard for determining a prevailing party. It argues the district court should have used an overall perspective because the case involved multiple actions and multiple parties. However, Hobson ignores the fact that its claims against the individual defendants were unrelated and separate from

the other claims in the case. The district court specifically found that the individuals "were not parties to the multiple claims and counterclaims between the State and the Contractors that comprised the overall case." (R. Vol. VIII, 1557). The district court also noted that Hobson's claims against the individual defendants were dismissed on summary judgment which was "the most favorable outcome they could possibly achieve." Id.

Under these circumstances, the individual defendants were clearly prevailing parties with respect to the claims by Hobson and the district court did not abuse its discretion in so holding. The district court's award of costs to the individual defendants should be affirmed.

VII. CONCLUSION

An award of attorney fees under I.C. § 12-117 is only proper if a party qualifies as a "prevailing party" and the nonprevailing party acted without a reasonable basis in law or fact. Neither SE/Z nor Hobson are "prevailing parties" and the State, at all times in this litigation, acted with a reasonable basis in fact or law. Therefore, the Contractors are not entitled to an award of attorney fees under I.C. § 12-117 and this Court should affirm the district court's decision. In addition, the Contractors pursued this appeal without a reasonable basis in fact or law, and this Court should award the State its attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 19th day of September, 2011.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of September, 2011, I caused to be served a true copy of the foregoing, by the method indicated below, and addressed to each of the following:

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